Petition

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CLERK

81-727

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

LYNN JOHNSTON, Petitioner,

v.

UNITED STATES OF AMERICA,
JAMES F. DOWLING, SPECIAL AGENT,
INTERNAL REVENUE SERVICE,

AND A-J TECHNICAL CREDIT UNION

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Lynn Johnston
13325 Unadilla Road
Unadilla, Michigan 48137

Petitioner, pro se

QUESTIONS PRESENTED FOR REVIEW

I. THE FOURTH AMENDMENT WARRANT QUESTION

In view of what petitioner will present here, especially §32 of the Act of March 3, 1791, chapter 15, 1 Stat. 199, 207, and §10 of the Act of March 3, 1815, chapter 100, 3 Stat. 239, 241 does 26 USC §7602 violate the Fourth Amendment of the United States Constitution?

II. THE BAD FAITH QUESTION

Can the lower courts ignore an intervenor under 26 USC 7609 who attempts to bring up what amounts to bad faith activities by IRS, pursuant to the standard set up by this Honorable Court in the cases of United States v. LaSalle National Bank, 437 U.S. 298 (1978) and United States v. Powell, 379 U.S. 48 (1964)?

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NOW COMES Miss Lynn Johnston, above named Petitioner, to petition this Honorable Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the 6th Circuit in this case as entered on the 17th of July, 1981

As grounds Petitioner Johnston respectfully shows the Court as follows:

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II, sec. 32, 1 stat. 207
II, sec. 38, 1 stat. 208

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U.S. REPORTS

United States v. LaSalle National Bank, 437 U.S.298 (1978).....1,9,10,A3

United States v. Powell, 379,U.S.48 (1964).
1,5,A3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the 6th Circuit has not yet been reported; a copy is set forth in the appendix, page A1. The opinions of the Federal District Courts are unreported and copies of those opinions are also set forth starting on page A2.

JURISDICTION

The Judgment of the Court of Appeals was entered on July 17,1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1), which confers authority for this Court to review any lower court case upon the petition of any party; and under the United States Constitution, the First Amendment, which acknowledges the right to seek redress of grievances by petitioning the Government.

APPLICABLE LAW

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

26 U.S.C. §7602

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to per-

form the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. §7604(a)

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

26 U.S.C. §7609 (b)(1)

(b) Right To Intervene; Right To Stay Compliance.—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

STATEMENT OF THE CASE

Between July 3 and October 25, 1979 six separate "summons" enforcement proceedings (26 USC 7602) in Federal District Courts for a general search and procurement of ANY AND ALL financial records or correspondence of Appellant were commenced. In each case Appellant intervened (26 USC 7609(b)(1)) to stay complaince by motion to intervene with brief and affidavit alledging Fourth Amendment violations and Bad Faith by government agents involving the First and Ninth Amendment rights of Appellant. In each case the District Courts entered Orders enforcing the IRS' "summonses"without any hearing of Appellant's Bad Faith proofs, evaluation of the testimony of her 22 witnesses or scrutiny of her documentation. In the matter of A-J Technical Credit Union, the Court did however Order an in camera inspection of IRS files on Appellant, a pre-trial conference and an evidentary hearing. The Ordered evidentary hearing was cancelled due to the May 23, 1980 Sixth Circuit Opinion on three of Appellant's companion cases (see page A2). Nor has Appellant had a stay of comolaince in any of the six cases. The present petition is the final appeal and represents the matured case.

ARGUMENT I

THE FOURTH AMENDMENT QUESTION

Petitioner Johnston respectively submits that great error has occured regarding the Fourth Amendment in revenue cases due largely to the fact that this Honorable Court has not taken notice of the search and seizure research cited in this petition as indicated by Shepard's citations for the U.S. thru August, 1980.

The following two enforcement sections (32 and 38) of the 1791 Distilled Spirits Act (Act of March 3, 1791, ch. 15, 1 Stat. 199) clearly show the intent of the First Congress with regard to the requirements of the Fourth Amendment in revenue cases. Additionally the 1815 Internal Revenue Act (Act or March 3, 1815, ch. 100, 3 Stat. 239)sections 10, 13 and 16 make it unequivocally clear that the Fourth Amendment requirements are applicable in all respects, and "to all acts that hereafter may be passed relative to internal duties, as to those heretofore passed and now in force".

§32 of the Act reads:

"That in case of the said spirits shall be fraudulently deposited, hid or concealed in any place whatsoever, with intent to evade the duties thereby imposed upon them, they shall be forfeited. And for the better discovery of any such spirits so fraudulently deposited, hid or concealed, it shall be lawful for any judge of any court of the United States, or either of them, or for any justice of the peace, upon **reasonable cause of suspicion**, to be made out to the satisfaction of such judge or justice, by the **oath or affirmation** of any person or persons, by **special warrant** or **warrants** under their respective hands and seals, to authorize any of the officers of inspection, by day, in the presence of a constable or other officer of the peace, to enter into all and every such place or places in which any of the said spirits shall be suspected to be so fraudulently deposited, hid or concealed, and to seize and carry away any of said spirits which shall be there found so fraudulently deposited, hid or concealed, as forfeited. 1 Stat. at 207 (emphasis added).

§38 of the Act reads:

"That in any prosecution or action which may be brought against any supervisor or other officer of inspection, for any seizure by him made, it shall be necessary for such supervisor or officer to justify himself by making it appear that there was **probable cause** for making the said seizure; upon which, **and not otherwise**, a verdict shall pass in his favour. And in any such action or prosecution, or in any action or prosecution which may be brought against such supervisor or other officer, for irregular or improper conduct in the execution of his duty, **the trial shall be by jury**. And in any action for a seizure, in which a verdict shall pass for such officer, the **jury** shall nevertheless assess reasonable damages for any prejudice or waste (according to the true amount in value thereof) which **shall be shown** by good proof to have happened to the spirits seized, in consequence of such seizure; and also for the detention of the same, at the rate of six per cent per annum, on the true value of the said spirits at the time of such seizure, from that time to the time of restoration thereof; which shall be paid out of the treasury of the United States; Provided, That no damages shall be assessed when the seizure was made for want of the proper certificate of certificates, or by reason of a refusal to show any officer of inspection, upon his request, the spirits in any entered house, building or place: And provided also, That if it shall appear from the verdict of the jury, that any such prejudice or waste was sustained by the negligence of the officer, he shall be responsible therefor to the United States." 1 Stat. at 208. (emphasis added)

§10 of this Act reads: (1815 Internal Revenue Act).

"That if any collector or his deputy, shall have **cause to suspect** a concealment of any goods, wares, or merchandise, in respect to which the respective provisions of **the acts imposing an internal duty** thereon have not been complied with, in any **particular** Dwelling-house, store, building, or place, (other than the manufactory in which the same were made.) they, or either or them, shall, upon proper application on **oath** to any justice of the peace, be entitled to a **warrant** to enter such house, store, or place, (in the day time only,) and there to search for such goods; and, if any shall be found, to seize and secure the same for trial." 3 Stat. at 241. (emphasis added)

§13 of this Act contains in relevant part:

"the onus probandi shall be on the claimant only when **probable cause** is shown for such prosecution, to be judged of by the court before whom the prosecution is had." 3 Stat. at 242 (emphasis added).

§16 of this Act reads:

"That the foregoing provisions of this act shall be applicable, in all respects, as well to all acts that may hereafter be passed, relative to internal duties, as to those heretofore passed and now in force." 3 Stat, at 243.

ARGUMENT II

THE BAD FAITH QUESTION

Appellant Johnston intervened under 26 USC 7609 and brought up Bad Faith activities by IRS in six spearate cases in the Federal District Courts. No evidentary hearing for her proofs has been had. Furthermore, the Sixth Circuit Opinion in the other five companion cases is in strong agreement with government Appellee's statement that "even if the 'facts' taxpayer relies on are prooved to be true they are insufficent to demonstrate the summons were issued in bad faith", - as a prime example of a pervasive god-like bureaucratic attitude that not only knows a thing before examination, but offically determines its insufficency as well. The controversy as to

whether IRS is entitled to illigitimate fruits is still a live area in the prosecution of Appellant.

This Court has by its opinions in United States v. Powell, 379 U.S. 48 (1964) and United States v. LaSalle National Bank, 437 U.S. 298 (1978) set up a bad faith standard. It is meaningless to have such a standard if allegations and proofs of bad faith can, in effect, be ignored or denied. The bad faith standard set up by this Court in the Powell and LaSalle cases, supra, in relevant part follows.

(from Powell)
" The IRS must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed--in particular, that the 'Secretary or his delegate,' after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect."

***

"Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."

(from LaSalle)
"(b) To enforce a summons under §7602, the

primary requirement is that it be issued before the IRS recomends to the Department of Justice the initiation of a criminal prosecution relating to the subject matter of the summons. This is a prophlactic rule designed to protect the standards of criminal litigation discovery and the role of the gands jury as a principal tool of criminal accusation.

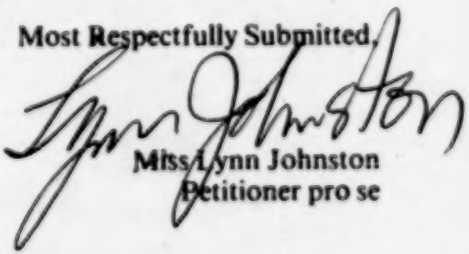
"(c) Enforcement of a summons is also conditioned upon the good-faith use of the summons authority by the IRS, which must not abandon its institutional responsibility to determine and to collect taxes and civil fraud penalties. That a single special agent intends only to gather evidence for a criminal investigation is not dispositive of the good faith of the IRS as an institution. Those resisting enforcement of a summons must disprove the actual existence of a valid tax determination or collection purpose by the IRS."

ARGUMENT CONCLUSION

Petitioner most respectfully submits that it is only because of the fact that this Honorable Court is **NOT** aware of Fourth Amendment research cited in this petition, that the entire subject of bad faith activities on the part of the IRS has arisen.

W H E R E F O R E petitioner believes that what is presented here is so substantial as to require this Honorable Court to order briefs on the merits and oral arguments to review not only the action of the courts below, but the research herein cited, she prays that a Writ of Certiorari will issue.

Most Respectfully Submitted,



Miss Lynn Johnston
Petitioner pro se

The 15th of October, 1981

AFFIDAVIT pursuant to Rule 28.5(c)

Lynn Johnston, after being duly sworn, deposes and says that she served the required number of copies of her Petition for Certiorari upon:

The Solicitor General (4 copies by air mail)
U.S. Department of Justice
Washington, D.C. 20530

A-J Technical Credit Union-by
Attorney Bruce H. Benz (3 copies)
321 S. Main Street
Ann Arbor, Michigan 48104

The Sixth Circuit Court of Appeals (3copies)
U.S. Courthouse and Post Office
100 E. 5th Street
Cincinnati, Ohio 45202

by placing said documents into sealed packages with sufficient first class postage affixed thereon and depositing them into the U.S. Mails located in Grand Rapids, Michigan.

Dated: October 15, 1981

Lynn Johnston
12325 Unadilla Road
Unadilla, Michigan 48137

Subscribed and sworn to before me a Notary Public:

My commission expires:___

ARLYNNE K. BOSS
Notary Public, Kent County, Michigan
My Commission Expires April 16, 1984

(seal)

APPENDIX

No. 80-1695

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED JUL 17 1981
John P. Hehman, Clerk

UNITED STATES OF AMERICA, ET AL.,
Petitioners-Appellees,

v.

A-J TECHNICAL CREDIT UNION,
Respondent

and

LYNN JOHNSTON, Intervenor-Appellant

O R D E R

BEFORE: LIVELY, CIRCUIT JUDGE, PHILLIPS AND PECK, SENIOR CIRCUIT JUDGES

Upon consideration of appellees' motion to dismiss the appeal as moot, and further considering that the response by intervenor-appellant does not dispute the appellees' representation that the IRS summons which is the subject of the appeal has been complied with in full, it is ORDERED that the motion be granted and the appeal is hereby dismissed as moot.

ENTERED BY ORDER OF THE COURT

(SIGNED)
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and
JAMES F. DOWLING, Special Agent,
Internal Revenue Service,

Petitioner,

vs. CIVIL ACTION

A-J TECHNICAL CREDIT UNION, NO. 79-72657

Respondent,

and

LYNN D. JOHNSTON,

Intervenor.

MEMORANDUM OPINION AND ORDER

This is an action to enforce an Internal Revenue Service (IRS) summons pursuant to 26 U.S.C. § 7402(b) and 7604(a). Petitioner James F. Dowling, a special agent of the IRS, has been assigned to investigate the federal tax liabilities of Lynn D. Johnston. On November 16, 1978 he served an IRS summons on A-J Technical Credit Union requesting that it produce all records relevant to this investigation of Ms. Johnston. A-J Technical Credit Union refused to comply; Ms. Johnston intervened and posed several objections to the summons.

The Court then conducted a show cause hearing on August 27, 1979. Ms. Johnston elaborated her objections at that time. She alleged that the summons was issued without probable cause, that the investigation had pried into her writings, beliefs, and associations, that the sole purpose of the investigation was to gather evidence for a criminal prosecution, and that the IRS had

needlessly harassed her. In short, she alleged that the IRS was acting in bad faith and with an illegitimate purpose. See, U.S. v. LaSalle National Bank, 437 U.S. 298 (1978); U.S. v. Powell, 379 U.S. 48 (1964).

The Court issued a written opinion on October 23, 1979, rejecting Ms. Johnston's lack-of-probable-cause defense as untenable, but granting Ms. Johnston the opportunity to present testimony regarding her allegations of institutional bad faith. Ms. Johnston has not yet had an opportunity to present her proofs at an evidentiary hearing. Nevertheless, the petitioners filed a motion for summary judgment in April of 1980. At that time the Court could only construe such a motion as little more than a request for reconsideration, since the Court in its October 1979 opinion clearly ruled that genuine issues of material fact remained to be developed. Petitioners supplemented their motion in June, 1980, bringing to the Court's attention new grounds for summary judgment. Petitioners alerted the Court to a recent (May 23, 1980) decision by the Court of Appeals for the Sixth Circuit, a decision which has great relevance to the instant case. The Court heard the parties' oral arguments concerning petitioners' motion and then allowed the parties to submit copies of the files in the cases which the Sixth Circuit decided in its May 23, 1980 Order.

The Sixth Circuit's Order affirmed final judgments in three other IRS summons enforcement proceedings in the Eastern District of Michigan.[1/] In each of these three cases the petitioners here

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1/ The cases are: United States and Dowling v. Ann Arbor Co-Op Credit Union, No. 9-72645 (Judge Joiner); United States and Dowling v. Feminist Federal Credit Union, No. 9-72644 (Judge DeMascio); and United States and Dowling v. Huron Valley National Bank, No. 9-72658 (Judge DeMascio).

sought to enforce a summons against financial institutions as part of their investigation of Ms. Lynn D. Johnston. In each of these cases Ms. Johnston intervened, filing identical briefs alleging IRS wrongdoing as a bar to enforcement of the summons. In each of the cases the district court listened to Ms. Johnston's arguments but denied her an opportunity for discovery or an evidentiary hearing to back up her allegations. In each of the three cases the district courts summarily adjudged the summonses to be enforceable and ordered immediate compliance.

Ms. Johnston appealed in all three cases. The Sixth Circuit consolidated the appeals and affirmed the judgments below. The Court of Appeals ruled that Ms. Johnston's challenges based on lack-of-probable-cause, bad faith, criminal investigative purpose, and retaliation for political speech activity were "unsubstantial".

The question now presented is whether the developments in these related cases compel this Court to reverse the course it adopted last October and to enforce the instant subpoena without allowing Ms. Johnston further opportunity to substantiate her allegations. The Court can only conclude that it must follow the lead of the other courts which have considered Ms. Johnston's defenses to IRS summonses.

There are two legal reasons for this. First, the decisions in the three district court cases were based upon the same controversy presently before this Court, involving the same issues and the same parties (except that the silent-party financial institutions are different in each case). Ms. Johnston's contentions in the three other cases duplicate her charges in the instant case word-for-word. (See her Motion to Intervene in all four cases.) The law holds that once the parties have litigated

certain issues in a case and the issues have been finally adjudicated, the parties cannot then re-litigate those matters in another case. 1B Moore's Federal Practice § 405. Out of considerations of judicial economy, fairness, and finality, a later court faced with the same issues and the same parties is bound to accept the ruling of the prior courts. This is called collateral estoppel or res judicata. Applied to the case at bar, this means that the Court must grant petitioners' summary judgment motion and order respondent to comply, since this was done in three other cases in this District on August 27, September 5, and September 14 of last year.

There is a second reason why the Court is constrained to grant petitioners' summary judgment motion. The Court must apply the law as declared by higher courts, such as the Court of Appeals for the Sixth Circuit.[2/] The Sixth Circuit's Order of May 23, 1980 reflects its assessment of the legal arguments Ms. Johnston proffers here. The Sixth Circuit found that those arguments and protestations did not merit any factual elaboration; the Court of Appeals held that as a matter of law an IRS summons is properly enforceable when allegations like Ms. Johnston's are offered in opposition to enforcement.

For the foregoing reasons petitioners' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Dated: August 11, 1980
Detroit, Michigan

PHILIP PRATT
United States District Judge

2/ Of course the difference between this doctrine and the doctrine of res judicata is that the Court is bound to follow the law announced by higher courts no matter who the parties to the case may be. Thus it is not important that petitioners and intervenor-respondent here were the parties in the cases which the Sixth Circuit decided on appeal.